In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1530

ROBERT ELVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without an opinion.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1971. The petition for a writ of certiorari was filed on March 31, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in permitting the prosecution to ask petitioner's character witnesses if they had heard that petitioner had been indicted for

other crimes and that he had been barred from various racetracks.

2. Whether, in the absence of a request by defense counsel, the court erred in not conducting a preliminary hearing to determine the factual basis of the government's questions to petitioner's character witnesses.

3. Whether, in the absence of a request by defense counsel, the court erred in not instructing the jury on the nature and purpose of the cross-examination of petitioner's character witnesses.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted under 18 U.S.C. 1621 on one count of perjury in testimony before a special federal grand jury. He was sentenced to six months in prison to be followed by two years on probation. The court of appeals (Lumbard, C. J.; Kaufman and Anderson, JJ.) affirmed from the bench at the conclusion of oral argument.

1. A special grand jury was impanelled in December 1966, to investigate the manner in which certain winning twin-double racetrack tickets were being cashed at Yonkers and Roosevelt Raceways in New York (Tr. 4-6).[1] During 1964 and 1965, various raceways in New York established a pari-mutuel system of betting on horse races known as the "twin-double", under which a player would win by selecting winning horses in each of four races. Initially, a ticket selecting two horses

[1] Tr. refers to the transcript of trial which is on file with the Clerk.

to win respectively in the sixth and seventh races would be purchased by the player. If both horses won, the player would exchange his "live" ticket for another reflecting his choice of the winners in the eighth and ninth races. If successful again, the player could collect $12,000 or more in winnings in exchange for a $2.00 bet (Tr. 8-9, 12).

The scheme uncovered by the special grand jury involved individuals, known as "cashers" or "ten-percenters", who, for a commission, would cash winning twin-double tickets for the actual owners in such a manner that the actual owners could evade the payment of income tax on their winnings (Tr. 109, 139). The "casher" would receive the winning twin-double ticket from the actual owner after the ninth race and go to the cashier's window. He would then complete an information form giving his own name and address and identification, a procedure which was required of all winners over $600; he would then receive the money, which he would turn over to the actual winner less a commission for "cashing" the ticket (Tr. 138-140, 199-200, 319-320). On the basis of the information given at the cashier's window, the racetracks would complete, in four copies, the required Internal Revenue Service Form 1099, notifying the Service that more than $600 had been paid to a winner. One copy of Form 1099 was sent to the Internal Revenue Service, one copy was retained by the racetrack for its files, one copy was sent to the New York State Tax Commission, and another copy was sent to the winner (Tr. 8-18, 29-30, 131-133). This procedure necessarily resulted in many Form

1099's being filed annually under the name of the "casher". In order to evade the payment of income taxes on these "winnings", the "casher", on his individual income tax return for a given year, would show betting losses slightly less than his gains (Tr. 73, 75, 152-153).

2. Petitioner's testimony before the grand jury on January 25, 1967, was stipulated at trial (Tr. 39-40):

> Q. On the winning twin-double tickets that you had, did you ever have anyone else who had an interest in those tickets?
>
> A. No.
>
> * * * * *
>
> Q. Was there ever an occasion when somebody else cashed a twin-double ticket for you that you had an interest in?
>
> A. No.
>
> * * * * *
>
> Q. So we can be perfectly clear, Mr. Elvin, did you ever receive a winning twin-double ticket from anyone and have that person ask you to either cash the ticket yourself or give it to somebody else to cash?
>
> A. No, sir, I didn't.

The undisputed evidence adduced by the government showed that in 1964, petitioner, also known as "Photo Bob", attended Yonkers and Roosevelt Raceways and frequented an area known as the "bullpen", where individuals, contrary to track rules, would buy and sell the first half of the winning twin-double tickets. Four "cashers", Joseph Pipitone, John Oppenheim,

John Holcomb, and Lawrence Strauss, all testified that on various occasions in 1964 they had dealings with petitioner in buying and selling "live" tickets in the "bullpen" at Yonkers and Roosevelt and other raceways, and on many occasions observed petitioner buying and selling winning tickets (Tr. 42-43, 51-55, 72, 141-143, 202-205, 321-324). Oppenheim and Strauss testified that petitioner had asked them to cash tickets he was holding which belonged to one Handel [2] (Tr. 146, 335-336).

3. After the government rested its case, defense counsel called five character witnesses to testify on petitioner's behalf. In addition to testifying as to petitioner's good reputation in his community, two of the witnesses, Stern and Siegel, testified that each had accompanied petitioner to a racetrack. Stern testified that to his knowledge the largest sum of money that petitioner had bet on any single race was $10 (Tr. 368, 406). During the cross-examination of Stern, the following colloquy occurred (Tr. 369-370):

> Q. Mr. Stern, you said you have heard what Mr. Elvin's reputation in the community is, is that correct?
>
> A. Yes.
>
> Q. Your testimony is you have heard that in the community his reputation is good?

[2] Petitioner at the time of trial was indicted with Handel on seven counts charging conspiracy to prepare and submit false tax returns to the Internal Revenue Service and the preparation of the same in violation of 18 U.S.C. 371 and 26 U.S.C. 7206(2). Trial has not yet begun on this indictment.

A. Yes.

Q. Have you heard that Mr. Elvin is under indictment for conspiracy?

A. Yes.

* * * * *

Q. Have you heard that Mr. Elvin is under indictment for five counts of filing false returns with the Internal Revenue Service?

A. No.

* * * * *

Q. Have you ever heard that he failed to file income tax returns—

THE COURT: Wait a minute. I will sustain an objection to that.

MR. MILMAN: (Defense Counsel): Your Honor, I object.

THE COURT: I sustained your objection.

After a side-bar conference during which the court indicated that it would permit questioning about whether petitioner had been barred from Yonkers Racetrack, the cross-examination continued (Tr. 372-373):

Q. Have you ever heard that Mr. Elvin was barred from the Yonkers Racetrack?

A. No.

* * * * *

Q. Have you ever heard that he was barred from the Liberty Bell Racetrack?

A. No.

Upon cross-examination of Siegel, the Assistant United States Attorney asked (Tr. 410-411):

Q. Now, Mr. Siegel, you said that you have heard things about Mr. Elvin in the community. Have you ever heard that he was barred from Roosevelt Raceway?

MR. MILMAN: I will object, your honor.

THE COURT: He can ask that.

A. I have never heard that.

Q. Have you heard that he has been indicted for conspiracy?

MR. MILMAN: Objection.

THE COURT: Yes, I think we have gone far enough. I will sustain that objection.

ARGUMENT

1. Petitioner's contention that the trial court abused its discretion in permitting the cross-examination of his character witnesses is without merit. Petitioner argues that the cross-examination was prohibited under *Michelson* v. *United States*, 335 U.S. 469. On the contrary, *Michelson* held that once a defendant has put his character in issue by reference to hearsay testimony as to his reputation in the community, the prosecution may test the accuracy of the evidence by asking other questions regarding actual events "which would probably result in some comment among acquaintances if not injury to defendant's reputation." 335 U.S. at 481. See also *United States* v. *Dibrizzi*, 393 F. 2d 642 (C.A. 2); *United States* v. *Giddins*, 273 F. 2d 843, 845 (C.A. 2), certiorari denied, 362 U.S. 971;

United States v. *Bilotti,* 380 F. 2d 649, 650 (C.A. 2), certiorari denied, 389 U.S. 944; *United States* v. *Silverman,* 430 F. 2d 106, 125-126 (C.A. 2).

Petitioner implicitly concedes that the events brought out on cross-examination occurred (Pet. 28), but argues that, since the indictment in this case, and the then pending indictment charging conspiracy, and the preparation and submission of false information on his income tax returns, all arose out of the same factual context, references to the latter indictment were of no probative value to test the credibility of his character witnesses' testimony concerning his reputation in the community. However, the questions pertaining to the conspiracy indictment properly tested the extent of the character witnesses' knowledge of actual events bearing on his character and reputation. In addition, the questions relating to petitioner's ejectment from various raceways bore as strongly on his "community image" as arrests or accusations. See *Shimon* v. *United States,* 352 F. 2d 449, 453 (C.A. D.C.).[3]

2. The trial court did not conduct a preliminary hearing to determine the factual basis of the questions which were to be put to the character witnesses upon cross-examination. Petitioner argues that this was error. Whether such a hearing was appropriate, the lack of one was not prejudicial since no request for a hearing was made by defense counsel and petitioner implicitly concedes that the questions had a factual basis (see Pet. 28-32).

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[3] Petitioner's challenge to the question regarding his failure to file income tax returns was not prejudicial since the trial judge sustained an objection to the question before it was completed.

3. Although he admits that he did not request cautionary instructions, petitioner contends (Pet. 44) that the court committed plain error in failing to instruct the jury on the limited purpose and nature of the prosecution's questions on cross-examination. In light of the overwhelming evidence of his guilt, the failure so to instruct does not warrant reversal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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